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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 787

RICHARD L. JONES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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OCTOBER TERM, 1960

No.

RICHARD L. JONES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Richard L. Jones, plaintiff in the Court below, through his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on October 5, 1960.

OPINION BELOW

The opinion of the Court of Claims (R. 105-112) is reported at 282 F. 2d 906.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1960; petitioner's motion for reconsideration of the Court's order dismissing petitioner's motion was denied on December 9, 1960 (R. 144). The

jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a retired enlisted man of the regular United States Navy, who was (1) recalled to active duty during World War II; (2) while so serving was temporarily promoted to commissioned rank in the Regular Navy; and (3) was returned to an inactive status on the retired list in the highest commissioned rank in which he had satisfactorily served, as determined by the Secretary of the Navy, is entitled to the benefits extended to "any officer" by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, 56 Stat. 359, 368, and thus entitled to have his retired pay computed on the basis of 75 percentum of the active duty pay he received at the time of his release from active duty.

STATUTES INVOLVED

Paragraph 4, Section 15 of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359, 368, provides as follows:

> "The retired pay of any officer of any of the services mentioned in the title of the Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provisions of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement."

Section 10 of the Act of July 24, 1941, c. 310, 55 Stat. 603, 605, provides as follows:

> "Sec. 10. Personnel appointed or advanced under the authority of this Act may be continued in their

temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency. Upon the termination of their temporary status such personnel shall, unless otherwise provided herein, revert to their permanent grades, ranks, or ratings, but upon being subsequently retired or in the case of retired officers returned to an inactive status, they shall, on condition that their performance of duty under such temporary appointments has been satisfactory, be placed on the retired list, or advanced thereon, as the case may be, with the highest rank held by them while on active duty: *Provided*, That except where specific provision is made otherwise, their retired pay shall be based on the pay of the rank or rating held at the time of retirement: *Provided further*, That nothing in this Act shall entitle such personnel, when recalled to active duty, to any other rank or rating than that in which they were serving at the time of retirement."

Section 10 of the Act of July 24, 1941, *supra*, was amended and superseded by Section 8(a) of the Act of February 21, 1946, c. 34, 60 Stat. 26, 28, which provides in material part as follows:

"Sec. 10. (a) Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency or, in the case of reserve and retired personnel, not longer than the period herein specified or the date of release from active duty whichever is the earlier and in no case longer than six months after the termination of war or national emergency. *Upon the termination* of their temporary status such *personnel* on the active list of the Regular Navy and Marine Corps shall as-

sume their permanent status and those *of the retired list* and of the respective Reserve Components, including the Fleet Reserve and Fleet Marine Corps Reserve, *shall have, when returned to an inactive status,* the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment, unless entitled to the same or higher grade and rank pursuant to section 8 of this Act, as now or hereafter amended.

"(b)(1) Personnel of the retired list *returned* to an inactive status with higher rank pursuant to subsection (a) shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

(c) Personnel of the classes described above who have been retired or released from active duty prior to February 21, 1946, shall be entitled to the benefits of this section *from the date of retirement or release from active duty,* as the case may be.

(d) Personnel accorded higher rank pursuant to this section shall, if subsequently assigned active duty, be recalled to active duty in the grades, ranks or ratings, with which they were retired or returned to an inactive status unless under other provisions of law they are entitled to higher grades, ranks, or ratings." (Emphasis added.)

STATEMENT

The facts, as stipulated and agreed upon between petitioner and respondent in the Court below, were as follows:

Petitioner is a former enlisted man of the United States Navy who held temporary appointments to commissioned ranks during both World War I and World War II and who currently holds the rank of Lieuten-

ant Commander on the retired list of the Regular Navy.

Petitioner, after his release from World War II active duty, and since July 1, 1950, has received retired pay computed on the basis of his rank of Lieutenant Commander on the retired list and based upon his years of active service in the United States Navy. However, he has not received retired pay based upon 75 per cent of the pay he was in receipt of at the time of his release from active duty, and it was to recover the difference in the retired pay received by him, and pay computed upon the basis of 75 per cent of his active duty pay, that his action in the Court below was brought.

The Court below held that the petitioner was not entitled to have his pay computed on the basis of 75 per cent of the active duty pay he received when released from active duty as he was not retired as a commissioned officer within the meaning of Paragraph 4, Section 15 of the Pay Readjustment Act of 1942, *supra*.

REASONS FOR GRANTING WRIT

1. The Court below has so far departed from the accepted and well-defined principles of statutory construction applicable to amendatory legislation as to necessitate the exercise of this Court's jurisdiction to obviate a patent injustice.

The Court below has repeatedly held that commissioned officers retired from military service prior to World War II, who were recalled to active duty during that war, and release from active duty subsequent to the passage of the Pay Readjustment Act of 1942, *supra*, were "re-retired" after the completion of their

wartime service and entitled to the benefits of Paragraph 4, Section 15 of the said Pay Readjustment Act of 1942, *supra*. *Carroll* v. *United States*, 117 C. Cls. 53; *Danielson* v. *United States*, 121 C. Cls. 533; and *Sherfey* v. *United States*, 141 C. Cls. 307, *cert. den.* 357 U.S. 926. In its decision the Court below accepted the premise that plaintiff was "re-retired" in October, 1946, when he was returned to the retired list of the Regular Navy following his wartime service (R. 107). The Court below, in its decision, also conceded that the legislative background of the February 21, 1946, amendment to the Temporary Promotions Act of 1942, *supra*, revealed an intent on the part of Congress that "re-retired" enlisted men should benefit from having held temporary officer appointments just as did temporarily advanced permanent officers (R. 107). Nevertheless, it held that despite the language of the 1946 amendment to the Temporary Promotions Act of July 24, 1941, *supra*, and the legislative history of the Act, the petitioner was not "re-retired" as an officer of the Regular Navy, but instead was retired or "re-retired" as an enlisted man, and thereafter advanced on the retired list to the highest commissioned rank in which he had satisfactorily served. Petitioner urges that, while this ruling is in accord with the provisions of the 1941 Act, which definitely provided that individuals such as the petitioner should revert to their permanent enlisted grades, ranks or ratings, and then subsequently be advanced on the retired list, it completely ignores and disregards the changes made in the law by the amendatory 1946 Act which provided that persons such as the petitioner should have "when returned to an inactive status the highest grade and rank in which they had served satisfactorily under a temporary appointment

as determined by the Secretary of the Navy." As a retired officer, the petitioner submits that he comes within the purview of Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, *supra*.

2. The construction which the Court below has placed upon the Temporary Promotions Act of 1941, *supra*, as amended by the Act of February 21, 1946, *supra*, thus not only fails to give effect to the language of the statute, but also disregards the legislative history of the bill which was ultimately enacted as the Act of February 21, 1946, *supra*. During the hearings before the Senate Committee on Naval Affairs on S. 1405, 79th Cong., 1st Sess., which ultimately was enacted as the Act of February 21, 1946, the Chief of Naval Personnel, Admiral Denfield, made the following statement, at p. 23, regarding the changes incorporated in former Section 10 of the 1941 Act by the amendatory Act:

> "[p. 23] *Admiral Denfield.* * * * the bill authorizes enlisted men who served in commissioned grades during the war to have their highest rank or rating held during the war upon their transfer to the Fleet Reserve or on release to inactive duty if already in the Fleet Reserve; this same highest rank or rating is provided for Reserve officers on release to inactive duty *and to retired officers and men on their return to inactive status*, and to officers and men of the Regular Navy when subsequently retired. Retired pay is based on the highest rank or rating held." (Emphasis supplied.)

Admiral Herbert G. Hopwood appeared before the Senate Naval Affairs Committee on November 6, 1945, and, at pp. 2-4, said:

> "[p. 2] *Admiral Hopwood.* At the first hearings before this committee it appeared to be the sense of the committee that we consider the overall prob-

lem of retirement of personnel including the retirement of enlisted men who served in higher commissioned grades during the war.

"*The Chairman.* Yes.

"*Admiral Hopwood.* *And thereupon we rewrote the bill to include in like manner throughout, retirement provisions which authorized enlisted personnel when they retire to retire with the highest rank held during the war and with retired pay based on that rank.*

"*The Chairman.* *The same as officers?*

"*Admiral Hopwood.* Yes, sir.

"*The Chairman.* *The same as regular officers?*

"*Admiral Hopwood.* *This would be a new feature; yes, sir.* (Emphasis added.)

* * * *

"[p. 4] *The Chairman.* Now our objective is to, as near as possible, treat enlisted men to the same as officers?

"*Admiral Hopwood.* Yes, sir.

"*The Chairman.* How is that accomplished in these provisions?

"*Admiral Hopwood.* We think that is accomplished under the provisions of the committee reprint No. 2 that we have here.

"*The Chairman.* What section?

"*Admiral Hopwood.* Section 8 of the bill, sir."

See also in this connection, the discussion of the amended Section 10 appearing in Senate Report No. 701, 79th Cong., 1st Sess., page 7, and debate in the Senate, 91 Cong. Rec. 10919, 10920.

It, of course, is elementary that an act should be construed in a manner to effect the intent of the legislature as disclosed by the legislative background of the Act. Cf. *United States* v. *Dickerson*, 310 U.S. 544, 562; *Galvan* v. *Press*, 347 U.S. 522, 526-528; and

United States v. *Congress of Industrial Organizations*, 335 U.S. 106, where, at pp. 112, 113, this Court said:

> "The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion."

3. The decision of the Court below affects the status and retired pay of several hundred former retired enlisted men of the Regular United States Navy who, during World War II, were recalled to active duty, and while so serving were given temporary appointments to commissioned rank in the Regular Navy and, upon release from active duty, were returned to the retired list, or should have been returned to the retired list of the Regular Navy, in the highest rank in which they had satisfactorily served as determined by the Secretary of the Navy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for grant of certiorari should be granted.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 300-56

(Decided October 5, 1960)

RICHARD L. JONES

v.

THE UNITED STATES

Fred B. Shields for the plaintiff. *Kemp & Kemp* were on the briefs.

Edgar H. Twine, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

DURFEE, *Judge*, delivered the opinion of the court:

In this action, plaintiff seeks to recover the difference between the retired pay he is receiving which is computed under statutes applicable to permanent enlisted men but based on the pay of a lieutenant commander, his highest temporary rank, and retired pay computed in accordance with paragraph 4, section 15, of the Pay Readjustment Act of 1942, 56 Stat. 359, 368, for the period beginning July 13, 1950. The parties have stipulated the facts which are, in substance as follows: plaintiff served as an enlisted member of the Navy prior to November 12, 1918. After a period of active duty and service in the Fleet Naval Reserve, on July 1, 1939, he was placed on the retired list of the Navy as a chief quartermaster, permanent appointment, pursuant to the provisions of section 203 and 204 of the Naval Reserve Act of June 25, 1938, 52 Stat. 1175, 1179.

He was recalled to active duty in 1942 and received successive temporary appointments to lieutenant commander. On his release from active duty on October 3, 1946, he re-

verted to his permanent enlisted grade and was advanced to lieutenant commander on the retired list. A determination by the Secretary of the Navy that the highest rank in which plaintiff had satisfactorily served was lieutenant commander was dated February 3, 1947.

All of plaintiff's officer appointments were made under the authority of the Temporary Promotions Act of July 24, 1941, 55 Stat. 603. When plaintiff was returned to the retired list in October 1946 he began to receive retired pay prescribed by the Naval Reserve Act of 1938, *supra*, with lieutenant commander as his basic pay grade. After enactment of the Career Compensation Act of 1949, 63 Stat. 802, his retired pay was computed in accordance with the rate provided in section 511 of that Act, which section can be applied to any retired member whether he be an enlisted man or an officer.

Paragraph 4, section 15 of the Pay Readjustment Act of 1942, *supra*, which plaintiff claims is applicable to him, provides:

> The retired pay of any officer of any of the services mentioned in the title of the Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

Plaintiff's position is that he is entitled to be paid at the rate prescribed in paragraph 4, section 15, *supra*, since he served in the Navy prior to November 12, 1918, and is an officer "hereafter retired" within the meaning of the statute. He maintains that the legislative history of section 8(c) of the Act of February 21, 1946, 60 Stat. 26, 28[1] which amended the Temporary Promotions Act of 1941, *supra*, indicates that it was the intention of Congress that temp-

[1] This Act is also known as Public Law 305, 79th Cong., 2d Sess.

porary officers like himself should receive the same retirement rights as permanent officers who served temporarily in higher grades. Plaintiff also asks us to decide the total number of years of creditable service for pay purposes in the event that his theory of recovery is held to be applicable. The gist of the Government's counter argument is that plaintiff is not a retired officer and, hence, cannot bring himself within the purview of the provisions of the Pay Readjustment Act; plaintiff's temporary officer service is fully recognized, the defendant insists, in the rate of retired pay which was and is applied to him.

Plaintiff is one of that group of men who was retired from military service prior to World War II, recalled to active duty during the war, and released subsequent to the passage of various pieces of legislation pertaining to the retirement and pay of military personnel, such as the Pay Readjustment Act of 1942. This court first recognized that such personnel ought to be considered as having "re-retired" after the completion of their wartime service in *Carroll v. United States*, 117 Ct. Cl. 53 (1948). In that case the plaintiff, a retired regular Army Officer, claimed the benefit of paragraph 4, section 15 of the 1942 Act. We have reiterated the *Carroll* holding in a number of cases involving re-retired officers. *Daniel v. United States*, 121 Ct. Cl. 583 (1952); *Sherfey v. United States*, 141 Ct. Cl. 307 (1958). At this time, the Government cannot seriously argue that plaintiff was not re-retired in October 1946 when he was returned to the retired list of the regular Navy following his wartime service. But, as we will discuss below, in what status was plaintiff re-retired constitutes the real controversy between the parties.

We must agree with plaintiff that the legislative background of the February 1946 amendment to the Temporary Promotions Act of 1941, accomplished by P.L. 305, reveals

an intent that re-retired enlisted men should benefit from having held temporary officer appointments just as do temporarily advanced permanent officers. We believe, however, that Congress intended to insure equal recognition and to obviate inequities in a special way. Prior to the enactment of P.L. 305, enlisted men who, like plaintiff, had served honorably and well in responsible officer positions would be returned to inactive duty as enlisted men and would have their higher temporary grades as honoraria only, with no pecuniary recognition of their services as officers. P.L. 305 was enacted to provide a monetary reward in recognition of the officer service of these enlisted men. It clearly accomplished this purpose for the plaintiff has, since his retirement, received pay based on the highest temporary rank held, although administered under generally applicable statutes rather than under the officer provisions of the 1942 Pay Readjustment Act.

We must disagree, however, with the plaintiff's suggestion that he was re-retired as an officer and is therefore entitled to the retired pay rate of paragraph 4, section 15. The *sine qua non* of the benefits of that portion of the 1942 Act is retirement *as* an officer since the statute speaks of *officers* "hereafter retired."

In the case of *Jakway* v. *United States*, No. 51-58, decided July 13, 1959, which was concerned with whether or not a warrant officer who had served on active duty as a colonel was entitled to have his retired pay computed under paragraph 4, section 15, this court looked to the language of the statute under which the plaintiff was relieved from active duty to determine what his status was at that time. We decided that paragraph 4, section 15 required retirement *as* an officer and the statutes under which Jakway had been retired[2] told us that he had been retired *as* an officer.

[2] Sections 402(b), 409, Title IV, Career Compensation Act of 1949, 63 Stat. 802, 817, 823.

The temporary Promotions Act of 1941, the controlling statute in this case, provided machinery by which the armed services could temporarily advance personnel to officer rank when and as needed during wartime. Any recovery of retirement benefits by plaintiff for his officer service must be viewed in the light of that Act since it is only by virtue of that Act that he held an officer appointment. P.L. 305 amended section 10 of the Act in this manner:

> Sec. 10(a) Personnel appointed or advanced under the authority of this act may be continued in their temporary status during such period as the President may determine, but not longer than six months after termination of war or national emergency or, in the case of reserve or retired personnel, not longer than the period herein specified or the date of release from active duty whichever is the earlier and in no case longer than six months after the termination of war or national emergency. Upon the termination of their temporary status, such personnel on the active list of the Regular Navy or Marine Corps shall assume their permanent status and those of the retired list and of the respective Reserve Components, including the Fleet Reserve and the Fleet Marine Corps Reserve, shall have, when returned to an inactive status, the highest grade or rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment, unless entitled to the same or higher grade or rank pursuant to section 8 of the Act, as now or hereafter amended.
>
> (b) (1) Personnel of the retired list returned to an inactive status with higher rank pursuant to subsection (a) shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

The language of the statute quoted above reveals three separate effects flowing therefrom. First, under no circumstances can a temporary promotion of a retired member persist beyond the final day of his active duty. Next, upon the termination of the temporary appointment, the service member resumes his permanent status if active, or is re-

turned to the retired or inactive status previously held. Finally, his pay, when he is placed on a returned to the retired list, will be based on the highest rank held, if the Secretary of the Navy deems that he has served satisfactorily in that rank.

Since plaintiff's temporary officer appointment terminated by operation of law on the last day of his active service, he then reverted to the only other military status he had, viz, a retired, permanent chief quartermaster, in other words, an enlisted man. His advancement to and classification as a lieutenant commander on the retired list was a separate transaction occurring only because of the statutory allowance that he would have, after resuming inactive status, the highest temporary active rank held. It is factually clear that the reversion to inactive status and the advance on the retired list were not a single transaction. Regardless of the fact that it was attempted to accomplish them by a single set of orders, they are separate and distinct both in fact and under the terms of the statute.

Irrespective of the actual date on which the plaintiff was designated a lieutenant commander on the retired list, such designation could have had no efficacy until a formal determination of satisfactory service in that rank was made by the Secretary of the Navy. This is apparent from the statutory language providing for such executive approval. Although plaintiff was administratively designated an officer on the retired list on October 3, 1946, it was not until February 3, 1947, that the Secretary determined that the plaintiff had so served satisfactorily. There was, therefore, a four month hiatus between the termination of plaintiff's active duty as an officer and his advancement as such on the retired list. Moreover, the statutes required that he be returned to inactive status as an enlisted man, and then be awarded the higher officer rank.

Thus, we see that the only possible interpretation of the facts before us is that plaintiff was re-retired as an enlisted

man and then advanced to officer status on the retired list in recognition of his temporary active service as an officer.

Section 10(b)(1) of the Act gives, we think, a further indication of the extent of the benefit which the Congress wished to confer through its enactment.

> Personnel * * * returned to an inactive status * * * pursuant to subsection (a) shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

The fact that the word "but" is employed indicates that pay based on such higher rank contradicts or is in some way inapposite to the rate of pay prescribed by law, that they are not the same thing, in other words. If the legally prescribed rate of pay should be held to be the law generally applicable to persons retired as officers, there would be no purpose in indicating by a qualifying phrase that pay would be based on the highest temporary grade or rank held. And the conjunction "but" implies contradiction, exception, or conditions in opposition to each other. The 1946 amendment to the Act indicates to us a purpose to continue in application the basic retirement laws previously applicable to personnel recalled to duty, at the same time authorizing tangible recognition of the temporary service in a higher status.

This court looks closely at the wording of statutes concerning retirement and retired pay as is evident from a reading of some of our recent decisions. In *Jakway v. United States*, *supra*, the plaintiff, who completed his active service as a warrant officer but had previously served as a colonel, sought to obtain the benefits of paragraph 4, section 15, as does the plaintiff in this case. Jakway had been retired under the provisions of section 402(b), Title IV, Career Compensation Act of 1949, *supra*. Section 409 of that Act provides:

> A member of the uniformed services who is retired pursuant to this title shall be retired in the rank, grade, or rating upon which his disability pay is based or in such higher rank, grade, or rating as may be authorized by law at the time of retirement.

Clearly, Jakway, whose disability pay was based on the pay of a colonel, was not retired as a warrant officer and then advanced to colonel. He was retired as a colonel as the statutes required and, accordingly, we held him to be entitled to the officer pay rate provided for in paragraph 4, section 15 of the Pay Readjustment Act of 1942.

Another case in which this court has looked to the language of the statutes to determine retired status is *Seastrom v. United States*, No. 200-57, decided November 4, 1959. The plaintiff, a permanent enlisted man, had served as a temporary warrant officer in the Navy. He was retired for disability under section 8(a) of the Temporary Promotions Act of 1941, *supra*. Seastrom sought to avoid the application of the Sales Statutes, 29 Stat. 351, as amended 49 Stat. 487, 490 which restricts the civilian activities of retired Navy officers and warrant officers. We held that the prohibitions of the Sales Act applied to him because of the wording of the statute under which he had been retired:

> An officer or enlisted man on the active list of the Regular Navy or Marine Corps, or an enlisted man of the Fleet Reserve or Fleet Marine Corps Reserve, who incurs physical disability while serving under a temporary appointment in a higher rank, shall be retired in such higher rank with retired pay at the rate of 75 per centum of the active-duty pay to which he was entitled while serving in that rank.

Seastrom was retired *as* a warrant officer and not as an enlisted man because the statute said that he should be *retired in* the higher grade, not advanced to it.

When we compare the wording of the statutes under which Jakway and Seastrom were retired with the language

of the retirement provision of the Temporary Promotions Act of 1941 we note a crucial difference. As to Seastrom, section 8(a) of that Act provided that he should *be retired in* his warrant officer grade. Similarly, as to Jakway section 409 of the Career Compensation Act of 1949 provided that he should *be retired in* the rank of colonel on which his disability retired pay was based. But, section 10(a) of the 1941 Promotions Act, as it bears on the instant case, says that the temporary appointment will terminate and that plaintiff "* * * shall have, when returned to an inactive status, the highest grade * * * in which, * * * [he] served satisfactorily * * *." [1]

The difference in meaning and effect between these two methods of accomplishing a release from active duty is significant and decisive. Had Congress intended that temporarily commissioned enlisted men in plaintiff's situation be retired as officers, we believe it would have said so as it did in the statutes applying to Jakway and Seastrom. But, instead of saying that plaintiff would be retired as an officer, the statute returned him to inactive status (which he had previously occupied as an enlisted man) and said he would then "have" the higher grade and emoluments flowing therefrom. We must conclude, therefore, that Congress intended Jones and others in his factual area to resume their status as retired enlisted men, and to them be granted a retired pay which recognized that, for a time, they had been called upon to assume greater responsibility and to discharge duties requiring higher skills.

Since the plaintiff could not have retired as an officer under the provisions of the applicable statute, he cannot qualify for retired pay pursuant to paragraph 4, section 15, of the Pay Readjustment Act of 1942, and, accordingly, recovery must be denied.

The plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment is granted. The petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*, and JONES, *Chief Judge*, concur.

WHITAKER, *Judge*, took no part in the consideration and decision of this case.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 300-56

RICHARD L. JONES

v.

THE UNITED STATES

Order

This case comes before the court on plaintiff's motion, filed November 4, 1960, for reconsideration of the court's opinion of October 5, 1960. Upon consideration thereof, together with defendant's opposition thereto filed December 6, 1960.

IT IS ORDERED this ninth day of December, 1960, that plaintiff's motion for reconsideration be and the same is denied.

BY THE COURT

/s/ MARVIN JONES
Marvin Jones
Chief Judge

FILED
APR 4 1961
JAMES R. BROWNING, Clerk

No. 787

In the Supreme Court of the United States

OCTOBER TERM, 1960

RICHARD L. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 787

RICHARD L. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A, pp. 1a-10a) is reported at 282 F. 2d 906.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1960. Petitioner's timely motion for reconsideration of the Court's order was denied on December 9, 1960 (Pet. App. B, p. 10a.). The petition for a writ of certiorari was filed on March 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a retired Navy enlisted man, recalled to active duty and temporarily promoted to Lieutenant Commander under the provisions of the Temporary Promotions Act of 1941 and then released from active duty, is entitled to retired pay under the Pay Readjustment Act of 1942.

STATUTES INVOLVED

Section 15, Paragraph 4, of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359:

> The retired pay of any officer of any of the services mentioned in the title of this Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

Section 10 of the Temporary Promotions Act of 1941, 55 Stat. 603, as amended, 60 Stat. 28 (emphasis added):

> Sec. 10. (a) Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency or, in the case of reserve and retired personnel, not longer than the period herein specified or the date of release from active duty whichever is the earlier and in no case longer than six months after the termination of

war or national emergency. *Upon the termination* of their temporary status such *personnel* on the active list of the Regular Navy and Marine Corps shall assume their permanent status and those *of the retired list* and of the respective Reserve Components, including the Fleet Reserve and the Fleet Marine Corps Reserve, *shall have, when returned to an inactive status*, the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment, unless entitled to the same or higher grade and rank pursuant to section 8 of this Act, as now or hereafter amended.

(b) (1) Personnel of the retired list *returned* to an inactive status with higher rank pursuant to subsection (a) shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

(2) Personnel of the active list of the Regular Navy and Marine Corps and personnel of the Fleet Reserve and Fleet Marine Corps Reserve appointed or advanced under the authority of this Act shall, when subsequently retired, if not otherwise entitled to the same or higher grade and rank or retired pay, be advanced to the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under temporary appointments, and shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

(c) Personnel of the classes described above who have been retired or released from active duty prior to [February 21, 1946], shall be en-

ed to the benefits of this section *from the date retirement or release from active duty*, as the e may be.

(d) Personnel accorded higher rank pursuant this section shall, if subsequently assigned ive duty, be recalled to active duty in the des, ranks or ratings, with which they were ired or returned to an inactive status unless ler other provisions of law they are entitled igher grades, ranks, or ratings.

* * * * *

STATEMENT

facts before the court below were stipulated y be summarized as follows: Petitioner first in the Navy on December 10, 1909, as an ice seaman. Through successive terms of en- t, he served until December 31, 1921, when honorably discharged for the convenience of ernment. Petitioner reenlisted in the regular on July 18, 1922, as a Quartermaster, 1st He then served on active duty until June 26, at which time he was transferred to Class of the Fleet Naval Reserve with the rank of Quartermaster, permanent appointment. On 1939, he was placed on the retired list of the vy in the grade of Chief Quartermaster, per- appointment.

oner was recalled to active duty on April 13, id, while serving on active duty, he was suc- promoted to Lieutenant (Jr. Grade), to ant, and finally, on June 1, 1946, to Lieu- Commander. All promotions were temporary

appointments made in accordance with the Temporary Promotions Act of July 24, 1941, *supra*, p. 2. Petitioner was released from active duty on October 3, 1946, at which time his temporary appointment as Lieutenant Commander was terminated. He then reverted to his permanent enlisted status as a Chief Quartermaster and was immediately advanced on the retired list to his temporary rank of Lieutenant Commander.

Since July 1, 1950, petitioner has been receiving retired pay computed at the rate prescribed in statutes applicable to Navy enlisted men, but based upon the pay of his rank as Lieutenant Commander on the retired list. By his suit in the Court of Claims, petitioner sought to recover the difference between his present retirement pay and retirement pay computed upon the basis of 75 per cent of his active duty pay as a Lieutenant Commander, as provided in Section 15, Paragraph 4 of the Pay Readjustment Act of 1942, *supra*, p. 2.

On cross motions for summary judgment, the Court of Claims held, on the facts of the case and as a matter of statutory application, that petitioner's retirement rights are derived solely from Section 10(a) and 10(b) of the Temporary Promotions Act of 1941 and that he was not entitled to the pay rate provided by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942.

ARGUMENT

On the facts pertinent to petitioner's case, and as a matter of plain statutory application and construc-

tion, petitioner is not entitled to the retired pay benefits prescribed by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942. The decision of the Court of Claims is, therefore, clearly correct and further review by this Court is not warranted.

Prior to his release from active Navy duty on October 3, 1946, petitioner was serving under a temporary appointment as a Lieutenant Commander pursuant to Section 10 of the Temporary Promotions Act of 1941. Section 10(a) of that Act specifically provided that petitioner's temporary appointment as an officer would terminate on the date of his release from active duty and that, upon the termination of his temporary status, he would assume his "permanent status," *i.e.*, his permanent enlisted status as a Chief Quartermaster, retired. When he returned to an inactive status in accordance with Section 10(a), petitioner was entitled to, and has been accorded, the highest rank on the retired list in which, as determined by the Secretary of the Navy, "[he] served satisfactorily under a temporary appointment * * *." And, by Section 10(b) of the Temporary Promotions Act of 1941, upon his return to an inactive status with the higher rank in which he served satisfactorily, petitioner was entitled to, and is receiving, "retired pay computed at the rate prescribed by law * * * but based upon [his] higher rank" as Lieutenant Commander.

Section 10 of the Temporary Promotions Act is, of itself, definitive and dispositive of petitioner's rights. His claim to the more remunerative benefits of Section 15, Paragraph 4, of the Pay Readjustment

Act of 1942 is plainly without merit. Section 15, Paragraph 4, applies only to officers of the Regular Navy "hereafter retired." *Danielson* v. *United States*, 121 C. Cls. 533. After serving under a temporary appointment as an officer in the Regular Navy, petitioner was released from active duty, but he was not and could not have been retired as a Regular Navy officer. It follows that the court below was correct in holding that, on the facts of petitioner's case, he does not qualify for retired pay pursuant to Section 15, Paragraph 4, of the Pay Readjustment Act of 1942 (Pet. App. A, p. 9a).

The decision is not, moreover, at variance with the legislative history of the 1946 Amendment to the Temporary Promotions Act. Consistent with the import of petitioner's extracts from the committee hearings on the 1946 amendment (Pet. 7-8), petitioner's service in the higher temporary rank of Lieutenant Commander is recognized in the retired pay he currently receives pursuant to Section 10(b) of the Temporary Promotions Act.[1] In addition, on the retired list he carries the highest rank held during the war. By the plain terms of the controlling statute, he is entitled to no more.

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[1] Petitioner's retirement rate is presently computed under Section 511 of the Career Compensation Act of 1949, 63 Stat. 802, 829, which applies to all retired members of the services.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 787

RICHARD L. JONES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF FOR THE PETITIONER IN REPLY TO BRIEF OF THE UNITED STATES

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Respondent, in its argument, states that, on the facts pertinent to petitioner's case and as a matter of plain statutory application and construction, petitioner is not entitled to the retired pay benefits prescribed by Paragraph 4, Section 15 of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359 (pp. 5, 6 Respondent's Brief).

It then disregards the actual provisions of the Temporary Promotions Act of 1941, 55 Stat. 603, as amended by Section 10 of the Act of February 21, 1946, 60 Stat. 26, just as did the Court below, and dis-

cusses instead only the provisions of the original 1941 Act before its amendment. It says in this connection:

> "Section 10(a) of that act specifically provided that petitioner's temporary appointment as an officer did terminate on the date of his release from active duty and that, upon the termination of his temporary status, he did assume his 'permanent status', *i.e.*, his permanent enlisted status as a chief quartermaster, retired." (p. 6 Respondent's Brief.)

The short answer to this is that the section does not so provide, instead the controlling language in Section 10(a) reads as follows:

> "* * * and those *of the retired list* and of the respective reserve components, including the Fleet Reserve and the Fleet Marine Corps Reserve, shall have when returned to their inactive status, the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment. * * *"
> (Emphasis supplied.)

Respondent next states that petitioner's claim to the more remunerative benefits of Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, *supra*, is plainly without merit; this portion of the statute it says, applies only to officers of the Regular Navy "hereafter retired". In support of this statement, it cites *Davidson* v. *United States*, 124 C. Cls. 533 (pp. 6, 7, Respondent's Brief). At this point, it may be emphasized that the petitioner's temporary appointment as a Lieutenant Commander was a temporary appointment in the *Regular Navy*, and not in any of the Reserve components of the Navy. As an officer on the retired list of the Regular Navy, he presently receives every benefit, social and otherwise, provided for perma-

penily commissioner officers of the Regular Navy except the pay here claimed. Further, the Court below cited *Davidson* v. *United States*, *supra*, as well as *Sherfey* v. *United States*, 141 C. Cls. 397, in support of the proposition that the petitioner had been re-retired in October, 1946, "When he was returned to the retired list of the Regular Navy following his wartime service." (Appendix, p. 3a.) In those cases, the Court had held that the release to inactive status of a retired officer after his recall to active duty during World War II was re-retirement within the meaning of Paragraph 4, Section 15 of the Pay Readjustment Act of 1942, *supra*.

Finally, respondent says the decision of the Court below is not at variance with the legislative history of the 1946 amendment to the Temporary Promotions Act of 1941, *supra* (p. 7 Respondent's Brief). It is is interesting to note that the court below held in this connection "we must agree with plaintiff that the legislative background of the February, 1946 amendment to the Temporary Promotions Act of 1941, accomplished by P. L. 305, reveals an intent that re-retired enlisted men should benefit from having held temporary officer appointments *just as do temporarily advanced permanent officers.* * * *" (Emphasis added.) It is difficult to see how the Court below could have held otherwise in view of the legislative history which was cited in support of petitioner's interpretation of the amendatory 1946 act. Temporarily promoted regular officers receive the pay here claimed. Certainly the respondent in the Court below did not attempt to argue otherwise and it does not point out any portion of the legislative history of the act which supports its position. Instead, it makes a broad statement that is con-

trary to the finding of the Court below and completely unsupported evidentially.

In interpreting an act of Congress, it is appropriate to consider its purpose and its legislative history. *United States* v. *Turley*, 352 U.S. 407, 413. Nor should the court refuse to give effect to the purpose of the Congress where it is clear even though it had not used the choicest words to describe its purpose. *United States* v. *Union Pacific Railroad Co.*, 253 U.S. 112, 117, 118. The legislative history of a statute is frequently a most fruitful means of instruction as to its proper interpretation. *Flora* v. *United States*, 362 U.S. 145, 151. Here petitioner has pointed out the specific language of the statute which supports his contention that upon release to inactive service he *was to be placed on the retired list* with the highest grade and rank, in which, as determined by the Secretary of the Navy, he had served satisfactorily under a temporary appointment. There is nothing in this language which in any way indicates that the Congress intended that an individual such as the petitioner should be reverted to a permanent enlisted status. *It did not say so and it changed the earlier act which had so provided.*

Moreover, the legislative history was discussed in detail by petitioner in the Court below, as well as in his brief in this court. Respondent has at no time *even attempted to discuss* the legislative materials referred to by petitioner, either here or in the Court below. The legislative history definitely establishes that it was the intention of the Congress to give enlisted men who were temporarily promoted to commissioned rank the same benefits which permanently commissioned regular officers of the United States Navy received on retirement by virtue of temporary advance-

ments in rank which they had received.' It is difficult to see how the petitioner could more fully and more definitely establish his right to the retired pay claimed for not only do the provisions of the statute so provide, but the legislative history establishes that the Congress so intended.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for grant for certiorari should be allowed.

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